language regarding telecommunications services in Section 621(b). There is no similar language with respect to information services.

The Commission also points to Section 621. The Commission states that section "authorizes local franchising authorities to require cable operators to obtain a franchise to construct a cable system over public rights-of-way. Once a cable operator has obtained a franchise for such a system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service."[91] That conclusion depends on the scope of the franchise, and as we have already explained, franchises can be and are often service-limited. Particularly in light of the significant constitutional issues that would be raised by a different approach, *see discussion supra,* nothing in the Cable Act can reasonably be interpreted to prevent a locality from issuing a franchise to use and occupy the public rights-of-way to provide cable services, and requiring a distinct authorization to use and occupy public rights-of-way to provide other services.[92]

## IV. THE COMMISSION NEED NOT ASSERT JURISDICTION OVER FRANCHISE FEES PAID ON CABLE MODEM SERVICE.

### A. Summary of Section.

This section addresses issues raised by the NPRM at ¶¶ 106-107, which ask whether the Commission can or should assert jurisdiction over franchise fees collected on cable modem service in the past. The question is misguided, for it presumes that the past collections were

[91] NPRM at ¶ 102.

[92] This result is hardly surprising in light of the broad definition of the term "franchise" in the Cable Act The term includes "any amendments, modifications or collateral agreements directly ancillary to such authorization." Thus the Act envisions that a "franchise" could actually be composed of several distinct grants which collectively define the rights and obligations of the cable operator.

unlawful; but in any case (a) state law doctrines will resolve any issues that may arise with respect to those payments; and (b) there is not a single, simple approach to resolving past payment issues, even if one assumes that the Telecommunications Act of 1996 prohibits payment of franchise fees on cable modem service.

### B. State Law Adequately Resolves Any Past Payment Issues.

Recovery of payments is not a new issue, but one in which state and local governments have long-standing experience.

Under the "Voluntary Payment" doctrine, voluntary past payments inny not be recovered from a local government even where a court invalidates the local law which required those payments. The general rule is that "in the absence of fraud, imposition, undue influence and the like, money paid to a municipality with a full knowledge of the facts, but under a mistake of the law, cannot be recovered." McQuillin Mun Corp § 49.62 (3rd ed. 2000). While this issue most often arises in the context of tax payments, the principle that voluntary payments are not recoverable has been applied to other types of payments such as building permit fees, inspection fees, mortgage liens and even criminal fines. *See, e.g., Beachlawn Building Corp. v. City of St. Clair Shores*, 370 Mich. 128 (Mich. 1963)(building permit fees); *Oubre et al. V. City of Donaldsonville*, 131 So. 293 (La. 1930)(inspection fees); *Cook v. City of Shreveport*, 144 So. 145 (La. Ct. App. 1932)(mortgage lien); *Draper v. Grant*, 205 P.2d 399 (Cal. Ct. App. 1949) (criminal fines).

This doctrine depends in large part on the dealings between the parties, and as such, cases applying the doctrine are decided on a case-by-case basis. But state law provides an adequate basis for resolving any issues that might arise – assuming past payments *were* unlawful (a point ALOAP disputes).

### C. Past Payments Were Lawful In Any Case.

But setting aside applicable state law doctrines, there is no issue here that requires the Commission's intervention. While it is true that, in some cases, fees were collected on the assumption that cable modem service was a cable service, this is at most a technical defect; as we have shown above, a fee could have been imposed on non-cable services independent of the fee levied pursuant to Section 622(b) without running afoul of the Cable Act's franchise fee limit. The Commission's finding that the parties were acting in good faith should be sufficient to insulate operators and municipalities for any potential liabilities resulting from this type of error.

As importantly, the Commission's question assumes that the Telecommunications Act of 1996 operated to invalidate contractual provisions in franchises requiring the payment of a franchise fee on cable modem services — even where the franchise provision had been adopted *prior to* the adoption of the law. The contract rights obtained by local governments in such cases were very valuable; and had the franchising authorities not obtained the consideration provided for in the contract, it is very likely that they would have taken it in other, permissible forms -- such as in the form of PEG capital, and more sophisticated institutional networks, for example. *See, e.g.* 47 U.S.C. § 542(g). Franchises might have been shorter — much shorter. Unless there is a clear indication that Congress meant to undo this arrangement – effectively making the provision retroactive so that the benefits that were granted were preserved, while the compensation that supported that benefit was modified – it must be assumed that Congress did not intend to alter the terms of existing contracts until those contracts expired.

Finally, and again assuming *arguendo that fees on cable modem service are prohibited altogether*, even for pre-1996 franchises, whether the fees would be unlawful would depend on a number of specific, individual factors which the Commission cannot assess -- including whether the 5% cap is being exceeded. Some communities collect less than the federally permitted 5%

maximum, and in those communities, the fact that a franchise fee is being collected on cable modem service is legally insignificant under any interpretation of the law – unless the fee on cable modem service and cable service combined exceed the limit of 5% of gross revenues from the provision of cable service.

## V. EFFECT OF CLASSIFICATION ON PRIVACY AND CUSTOMER SERVICE ISSUES

### A. Summary of Section.

This section addresses issues raised by ¶¶ 108 (customer service) and 111-112 (privacy). The Commission asked the effect of its classification on local authority over customer service and privacy provisions. ALOAP agrees with the Commission that local authority is not affected by the regulatory classification of cable modem service as an interstate information service

### B. Localities Have Clear Authority To Protect Consumers and Protect Privacy.

As shown in Part II, the Cable Act expressly identifies areas where it intended to limit local authority to regulate services that are not cable services Both the privacy and consumer protection provisions reserve local and state authority to regulate cable modem services.

As the Commission properly notes, the consumer protection provision broadly permits a locality to establish "customer service requirements of the cable operator," *and* not just "customer service requirements related to the provision of cable service." 47 U.S.C. § 552(a). More to the point, the statute states that "nothing in this title" preempts state or local authority to protect consumers of cable modem service, except to the extent "expressly provided" in Title VI. 37 U.S.C. § 552(d) There is no express preemption. Indeed, as we explained at the outset, preemption in this area would be *counter-productive*.

The privacy provision by its terms explicitly reaches services in addition to cable services. And, as the Commission also rightly notes, the section expressly reserves local and state authority with respect to privacy. That authority therefore extends to cable modem service. Preemption in this area would likewise be counterproductive, although local franchising authorities are also well aware that privacy issues surrounding the Internet are complex, and must be handled with sensitivity. One central concern is to ensure that privacy policies are specific, fair, and provided to subscribers before service begins and periodically thereafter. That is something local governments are well-equipped to do. Comcast made news this Spring when it announced policies that subscribers thought would permit it to monitor use of the Internet closely. Comcast responded by announcing that it would not implement such a policy. It is not at all clear that the issue is a dead one, however. In St. Paul, Minnesota, for example, the operator originally issued a privacy policy that explained that it would monitor Internet use and provide information regarding subscriber use to third parties so that advertising could be targeted to cable modem subscribers.[93] Thus, there is reason to be concerned that, absent some oversight, the public's interest in privacy will not be adequately protected.

## VI. THE NPRM IS BASED ON MISTAKEN ASSUMPTIONS.

### A. The Commission Cannot Mandate Regulatory Parity.

The Commission's approach to the NPRM assumes that Congress intended to promote regulatory parity. For example, at ¶ 85 of the NPRM the Commission asks:

> To what extent should our decision regarding multiple ISP access requirements be influenced by the desirability of 'regulatory parity,' namely the presence or absence of multiple ISP access regimes for other technologies (such as wireline, terrestrial wireless, and satellite) that offer residential high-speed Internet access service?

[93] *See* Letter from David Seykord, MediaOne, to Holly Hansen, City of St. Paul Cable Communications Officer, (March 29, 1999), attached hereto as Exhibit H.

Rather than providing for regulatory parity, however, the Telecommunications Act prescribed regulatory diversity, at least as between common carriers, cable systems and satellite-based providers of services. For example, Section 651 of the Cable Act, 47 U.S.C. § 571, allows common carriers to provide cable service via radio-based systems (in which case the carrier is subject to regulation under Title III and Section 652, but not Title VI); via wireline systems as a true common carrier (in which case the carrier is subject to regulation under Title II and Section 652, but not Title VI except for 652); or "in any manner other" than the foregoing, in which case the common carrier is either subject to all the requirements of Title VI, or subject to the (different) regulatory requirements that apply to open video systems. Cable Act Section 653(c), 47 U.S.C. § 573(c). What Congress intended to do was to allow communications providers to offer service under different regulatory regimes, each of which offered specific protections to consumers, and to allow the market to determine which model or models would prevail. As the Act is structured, for example, a telephone company that provided cable service on a common carrier basis would not be subject to must-carry rules. On the other hand, it could not refuse to carry the programming of any broadcaster willing to pay the going rate for carriage. The price of avoiding must-carry regulation would be a system that had to be fully "open" without regard to whether the openness requirement was required to prevent anticompetitive conduct.[94] A cable operator avoids strict common carrier regulation, but in return must assume a variety of explicit obligations to provide access to its systems to others (Section 611, Section 612, Section 614 and Section 615).[95]

[94] Even if there were no general common carrier requirement to allow others to use a provider's facilities, such a requirement could be imposed to protect competition. *See generally, Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *MCI Comm. Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1982).

[95] Diversity in regulatory treatment is not limited to wireline cable service providers. The Telecommunications Act specifically preempted local taxation with respect to direct-to-home satellite service. Telecommunications Act Section 602, 47 USC 152 nt. It specifically preserved other local laws

As a result, the Commission must be careful not to tilt the models established by Congress by eliminating obligations in the interest of ' par ty telephone companies to escape common carrier obligations *and* escape Title VI requirements would, for example, upset the balance of obligations established by Congress. Likewise, treating cable modem service as if it were an information service provided via a common carrier system and justifying preemption of local authority on that ground undermines the structure of Title VI, which envisions significant local control of cable systems and cable operators.

### A. Cable Operators Exercise Substantial Control Over Cable Modem Service.

The Commission appears to be examining the extent to which cable operators can exercise editorial control over cable modem service, NPRM ¶ 87. The answer is that operators can exercise substantial control. But the Commission fails to note one of the most significant consequences of this fact for the NPRM: the Commission based its determination that cable modem service is not a cable service on the assumption that operators exercise no meaningful control over Internet service, are a mere conduit for subscriber/user communications, and for that reason are not providing a cable service when providing a cable modem service:

> We believe that the one-way transmission requirement in that definition continues to require that the cable operator be in control of selecting and distributing content to subscribers and that the content be available to all subscribers generally.

NPRM ¶ 67.

The Commission's holding plainly does *not* require that the operator control the content of each service carried, because it is self-evident that there are very few services offered over a cable system which pass that test. Cable operators do not control the content of HBO; HBO

governing taxation of cable services and telecommunications limited Telecommunications Act Section 601(c)(2).

does. The Commission's statement distinguishes between transport services (which is what was at issue in the video dial tone case on which the Commission relies), on one hand, and operator selection of services to be carried (subject to certain regulatory limits) and the terms and conditions under which content will be offered on the other. It is the latter that typifies cable services. The operator's control does not even need to be exercised. That is to say, a cable operator is still a cable operator even if it decides to leave the choice of channels carried to its subscribers; or decides to install enough channel capacity to carry all services. An operator does not lose its status because a channel (such as ESPN) is so popular that it must be carried; because certain channels (broadcast channels) must be carried; because the operator does not control what programming is carried on ANY channel after contracting with the programmer; or because (as is the case with PPV) the choice of the programming that is available is made by the PPV provider and the choice of the programming that is delivered is made by the subscriber from a series of menu options.

In response to ¶ 87, ALOAP notes that the provision of cable modem service involves the same sorts of choices. The operator decides what services will be available and directly controls the use of the service. For instance, public information indicates that operators have in fact used their position to limit what services ISPs can provide to subscribers via the cable system.[96] Comcast's user agreement unmistakably restricts how a subscriber may use the service:

> THE SERVICE IS FOR PERSONAL AND NON-COMMERCIAL USE ONLY AND CUSTOMER AGREES NOT TO USE THE SERVICE FOR OPERATION AS AN INTERNET SERVICE PROVIDER, A SERVER SITE FOR FTP, TELNET, RLOGIN, E-MAIL HOSTING, "WEB HOSTING" OR OTHER SIMILAR APPLICATIONS, FOR ANY BUSINESS ENTERPRISE, OR AS AN END-POINT ON A NON-COMCAST LOCAL AREA NETWORK OR WIDE AREA NETWORK, OR IN CONJUNCTION

[96] *See* Julia Angwin, *Open Access Isn't So Open at Time Warner*, The Wall Street Journal, May 6, 2002, at B1.

WITH A VPN (VIRTUAL PRIVATE NETWORK) OR A VPN TUNNELING PROTOCOL

[Capitalization is in original].[97]

In the Broward County case cited by the Commission, Comcast went so far as to allege, and the judge appears to have presumed, that Comcast exercised editorial control over its Internet services. *Comcast Cablevision v. Broward County*, 124 F.Supp.2d 685, 693 (S.D. Fla. 2000) ("The imposition of an equal access provision by operation of the Broward County ordinance both deprives the cable operator of editorial discretion over its programming and harms its ability to market and finance its service, thereby curtailing the flow of information to the public.") Thus, operators have retained, or purport to retain, control over who may provide the service, how it is to be offered, and critical aspects of the content of the service.

### B. There Are No Explicit Statutory Provisions or Legislative History Justifying the Commission's Assertion of Jurisdiction Over Cable Modem Service As a Non-Cable Service; Congress Intended Cable Modem Service To Be A Cable Service.

At ¶ 79, the Commission seeks "comment on any explicit statutory provisions, including expressions of congressional goals, that would be furthered by the Commission's exercise of ancillary jurisdiction over cable modem service."[98] There are no such expressions, *inter alia*

[97] http://comcast.comcastonline.com/memberservices/subscriberagreement/default.asp

[98] Similarly, in the NPRM at ¶ 105, the Commission "note[s] Congress' concern regarding new taxes on Internet access imposed for the purpose of generating revenues when no specific privilege, service, or benefit is conferred and its concern regarding multiple or discriminatory taxes on electronic commerce." That observation depends on the several mistaken assumptions, including the mistaken assumption that Congress intended for cable modem service to be free from franchising requirements or franchise fees. The Congressional expression to which the Commission is referring is set out in the Internet Tax Freedom Act, § 1104, which contains an explicit exception for franchise fees imposed on cable modem service under 47 U.S.C. § 542: "Exception.--Such term does not include any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573)...." There was no reason for Congress to include that exception unless it assumed that cable modem service was -- or at least could be -- a cable service.

because Congress explicitly wanted cable modem service treated as a cable service, and hence subject to state, local and federal jurisdiction as provided in Title VI. Even in 1984, long before the 1996 amendment to the Act, Congress had recognized that the ability of subscribers to download information from various locations was a cable service. "For instance, the transmission and downloading of computer software...to all subscribers to this service for use on personal computers would be a cable service...Moreover, the fact that such downloaded software could be used...for a wide variety of purposes...would not make the *transmission or downloading a non-cable service."* [emphasis added].[99] Fully interactive services – services that permitted a subscriber to make individualized selections through manipulation of data -- were not cable services under the 1984 Cable Act, while a service that gave a limited set of menu choices with a pre-ordained set of responses would be a cable service. In 1996, Congress added the word "use" to permit subscribers to interact, and therefore obtain individualized responses in connection with a cable service. The legislative history describes the intended effect explicitly:

> The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels *and information services* made available to subscribers by the cable operator, *as well as enhanced services*. This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.

(emphasis supplied). H.R. Rep. No. 104-458 at 169. *See also* p. 247 *supra* (Statement of Rep. Dingell). It is hard to imagine how Congress could have been clearer – indeed, even the cautionary reference to "dial-up service" is a clear indication that Congress intended to treat cable Internet service as a cable service.

[99] H.R. Rep. No. 98-934, at 42

## CONCLUSION

1. At ¶ 98, the Commission seeks "comment regarding whether we should interpret the Commission's assertion of jurisdiction under the Communications Act to preclude State and local authorities from regulating cable modem service and facilities in particular ways."

> *Local authority to regulate cable modem service is protected by Title VI. Title VI contains some provisions which preempt local authority to regulate cable modem service, but explicitly and implicitly preserves local authority over cable modem service in other regards. Title I does not give the Commission authority to override the local franchising scheme approved by Congress in Title VI. Title I does not give the Commission broad authority to preempt state and local laws regarding information services, except, possibly, as ancillary to its jurisdiction under other titles of the Communications Act. Here the Commission does not appear to be asserting ancillary jurisdiction. It therefore cannot use its "assertion of jurisdiction" as a ground for broad preemption.*

> *As importantly, this proceeding does not just involve "regulation," as the Commission uses that term. When local governments charge fees for use of the public rights of way, or franchise use of the public rights of way, they are acting in a sovereign capacity, and exercising their rights as owners or trustees of public property. The Commission's Title I authority does not give it authority to preempt state or local government property rights, or authority to adjudicate the use of public rights-of-way generally.*

2. At ¶ 98, the Commission seeks "comment as to any additional basis for preempting such regulations."

> *Given the Commission's classification of cable modem service as a non-cable, non-telecommunications service, there is no additional basis for preemption. The provisions to which the Commission points as potential sources of preemptive authority protect local authority over cable modem service.*

3. At ¶ 99, the Commission seeks "comment on any other forms of State and local regulation that would limit the Commission's ability to achieve its national broadband policy, discourage investment in advanced communications facilities, or create an unpredictable regulatory environment." Specifically, the Commission seeks comment "as to whether we should use our preemption authority to preempt specific state laws or local regulations."

*Even if the Commission had broad preemption authority, it should not use that authority to preempt specific state laws or local regulations. Local governments are promoting the deployment of cable modem facilities and promoting the development of broadband applications that will encourage use of cable modem facilities. In any case, ¶ 99 does not provide sufficient notice of the regulations at issue to allow local governments to provide fair comment.*

4. At ¶ 102, the Commission seeks "comment on how our classification of cable modem service as an interstate information service impacts public rights-of-way and franchising issues."

*The Commission classification leaves local governments free, inter alia: to require franchises for non-cable services to the extent they are not prohibited from doing so by state law; to require rents for use and occupancy of the public rights of way to provide cable modem service to the extent that they are not prohibited from doing so by state law; and to regulate the public rights-of-way and apply other requirements of local law (zoning classifications, etc.) to providers of cable modem service.*

5. At ¶ 102, the Commission seeks "comment on whether providing additional services over upgraded cable facilities imposes additional burdens on the public rights-of-way such that the existing franchise process is inadequate."

*The provision of cable modem service does place substantial additional burdens on public rights-of-way. The existing franchising process allows localities to protect their interests by requiring additional authorizations before the public rights of way are used or occupied to provide non-cable services.*

6. At ¶ 102, the Commission asks whether "Title VI nevertheless preclude local franchising authorities from imposing additional requirements on cable modem service" given the additional burden on the public rights of way.

*Title VI does not preclude local governments from imposing additional requirements on cable modem service.*

7. At ¶ 102, the Commission tentatively concludes that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service."

> *State law, not Title VI, is the source of local franchising authority, as the Fifth Circuit concluded in City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999). In that sense, the Commission's tentative conclusion is correct. However, consistent with Title VI, local governments may issue a franchise to use and occupy public rights-of-way to provide cable services, and require further authorizations to use and occupy public rights-of-way to provide cable modem service.*

8. At ¶ 102, the Commission seeks comment generally on the scope of local franchising authority over facilities-based providers of information services, and asks specifically whether "State statutes and constitutional provisions authorizing local franchising in terms of utility services generally, or cable and telecommunications networks and services specifically, authorize localities to franchise providers of information service under existing law?

> *No entity (other than perhaps an abutting property owner) can place permanent facilities in public rights-of-way without obtaining a state or local authorization to use and occupy the public rights-of-way. In some states, certain providers may be excepted from local franchising requirements (and instead may need to obtain a state authorization), but in most cases the exceptions are limited to common carriers providing telephone and telegraph services, or specified utilities with an obligation to provide uniform, universal service. As a result, in most states, an entity that wished to install facilities to provide only "information services" would be required to obtain either a state or local authorization before using and occupying the public rights of way to provide that service.*

9. At ¶ 102 the Commission asks if a facilities-based information service provider generally could be required to obtain a franchise to provide services, "is there any basis for treating facilities-based providers of information services differently based on the facilities used?"

*There is no reason to permit a cable operator to avoid transfer or fee requirements that could be applied to an entity that uses and occupies the public rights-of-way to provide only an information service.*

10. At ¶ 104, the Commission states that some "commenters have raised questions about potential State and local actions that could restrict entry, impose access or other requirements on cable modem service, or assess fees or taxes on cable Internet service," and seeks comment on these issues.

*Local government actions have not delayed or prevented the deployment of cable modem services. Cable modem service is widely deployed, and has prospered under local government regulation.*

11. At ¶ 105, the Commission appears to seek comment on its conclusion that, because its Declaratory Ruling "found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined."

*This tentative conclusion is incorrect. Among other things, cable modem service, as the Commission describes it, is a bundle of services which includes cable service. Under the Cable Act, because the service includes some cable services, revenues from the service are subject to a franchise fee under 47 U.S.C. § 542(b).*

12. At ¶ 105, the Commission also tentatively concludes that "Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service," and seeks comment on that issue.

*Title VI preserves local authority to impose fees on non-cable services. It does not provide "an independent basis" for assessing franchise fees on non-cable services provided by the cable operator; state and local law can (and in many cases does) provide that authority.*

13. At ¶ 107, the Commission states that it is seeking "comment on whether disputes regarding franchise fees based on cable modem servicc implicate... a national policy. given that

the fees in question were collected pursuant to section 622 and that our classification decision will alter, on a national scale, the regulatory treatment of cable modem service."

> *Disputes related to fees on cable modem service going forward do not implicate a national policy, and do not require a uniform national response, even assuming cable modem service is not a cable service. At least pre-1996 franchises are grandfathered, so that there is no question franchise fees can be collected on cable modem service under those franchises. Going forward, authority to charge a fee on cable modem service would be a function of state and local law, and any disputes are best resolved by state courts.*

14. At ¶ 107, the Commission seeks comment as to "whether it is appropriate to exercise our jurisdiction under section 622 to resolve the issue of previously collected franchise fees based on cable modem service revenues or whether these issues are more appropriately resolved by the courts."

> *It is not appropriate for the Commission to exercise its jurisdiction, as there is no real issue with respect to past fees, even assuming for the sake of argument that there are limits on local authority going forward. State law can effectively resolve any disputes that arise, and the disputes are not likely to lead themselves to uniform resolution.*

15 At ¶ 10X, the Commission asks whether the "authority conferred on franchising authorities by section 632(a) of the Communications Act to establish and enforce customer service requirements apply to cable modem service provided by a cable operator?"

> *Yes, it does. But, local authority to regulate customer service standards does not depend on "authority conferred" by Section 632. States and localities have independent authority outside of Title VI to protect consumers.*

16. At ¶ 108, the Commission asks whether "the provisions in section 632(d), stating that nothing in Title VI "shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by [Title VI]," or "to prevent the establishment or enforcement" of customer service laws or

regulations" that exceed Commission standards or address matters addressed by standards under Section 632, apply to cable modem service?

> *Yes, it does. There is no specific preemption of regulation of customer service regulations of cable modem service under Title VI.*

17. At ¶ 112, the Commission states that it believes that "cable modem service would be included in the category of "other service" for purposes of section 631 [the privacy provisions of Title VI]", and seeks comment on this interpretation.

> *ALOAP agrees with this interpretation. Section 631 also protects local authority to establish privacy requirements.*

18. At ¶ 87, the Commission seeks information as to the degree to which operators may exercise control over cable modem service.

> *Cable operators can and do exercise substantial control over cable modem services.*

19. At ¶ 85 the Commission asks to what extent its decision should be based on the desirability of "regulatory parity."

> *The Communications Act requires regulatory disparity, not parity in the treatment of common carriers and cable systems. Hence, regardless of the desirability of "regulatory parity," the result in this rulemaking cannot be driven by that goal.*

20. At ¶ 79 the Commission seeks comment on any "explicit statutory provisions, including expressions of congressional goals, that would be furthered by the Commission's exercise of ancillary jurisdiction over cable modem service."

> *No such goals would be served, as the legislative history actually shows the reverse: it indicates that Congress intended for cable modem service to be treated as a cable service. In any event, the Commission's ancillary authority must be exercised in a manner that conflicts with the fundamental regulatory structure adopted by Congress. Local franchising, local regulatory power and local property rights are all part of that fundamental structure and cannot be controverted merely by Commission fiat.*

***

The Commission has no legal authority for preempting local authority over cable modem service. Nor does the Commission have any factual justification for such an action. And Commission action in this field would not only raise fundamental issues of federalism, but would interfere with the ability of local governments to perform vital tasks that the federal government is either ill-equipped or simply not empowered to perform. Thus, federal preemption would actually harm the interests not only of local governments, but of society at large. The Commission must not lose sight of the fact that local officials have the best interests of their communities at heart and have absolutely no reason to interfere with the deployment of cable modem services. For all these reasons, ALOAP urges the Commission to refrain from any action that would affect local authority regarding cable modem services.

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